

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NICHOLAS G. KENNEDY,

Petitioner,

v.

NOT FOR PUBLICATION

MEMORANDUM & ORDER
12-CV-0737 (MKB)

WILLIAM CONNOLLY, Superintendent,
Wende Correctional Facility,

Respondents.

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MARGO K. BRODIE, United States District Judge:

Petitioner Nicholas Kennedy brings the above-captioned habeas corpus petition pursuant to 28 U.S.C. § 2254, in which he alleges that he is being held in state custody in violation of his federal constitutional rights. Currently before the Court is Petitioner's motion to hold his habeas petition in abeyance to permit him to submit a writ of error coram nobis to the Appellate Division. (Pet. Mot. Stay., Docket Entry No. 17.)

In the context of habeas petitions, "when a petition presents both exhausted and unexhausted claims, a federal court may in appropriate circumstances stay the petition and hold it in abeyance to give the petitioner the opportunity to exhaust all of his claims. *Henry v. Lee*, No. 12-CV-5483, 2013 WL 1909415, at *3 (E.D.N.Y. May 8, 2013) (citing *Rhines v. Weber*, 544 U.S. 269, 276 (2005)). While courts retain discretion to exercise this authority, they are limited by the Supreme Court to issue the abeyance (1) "where it 'determines there was good cause for the petitioner's failure to exhaust'" and (2) the claim is not 'plainly meritless.'" *Id.* (citing *Rhines*, 544 U.S. at 276).

By decision dated August 7, 2013, the Appellate Division, Second Department denied Petitioner's writ of error coram nobis, on the ground of ineffective assistance of appellate counsel, to vacate the Appellate Division's prior decision affirming the judgment of the County Court, Suffolk County. *See People v. Kennedy*, 969 N.Y.S.2d 923 (App. Div. 2013). In view of the Appellate Division's denial of Petitioner's writ of error coram nobis based on a claim of ineffective assistance of appellate counsel, Petitioner's application to hold his habeas petition in abeyance is denied as moot.

SO ORDERED:

s/MKB
MARGO K. BRODIE
United States District Judge

Dated: September 30, 2013
Brooklyn, New York